**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **CHARLES DAVID LAPEE** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **SIMPLEX GRINNELL** | ) | |
| **TURNER CONSTRUCTION** | ) | |
| Respondents | ) | Docket No. 1,011,568 |
| | ) | |
| AND | ) | |
| | ) | |
| **SEDGWICK CMS** | ) | |
| **LIBERTY MUTUAL INS. CO.** | ) | |
| Insurance Carriers | ) | |

## ORDER

Respondent, Turner Construction, and its insurance carrier, Liberty Mutual Ins. Co., request review of the March 10, 2004 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

## ISSUES

It was undisputed that claimant suffered an injury to his left eye on June 6, 2003, in the course of his employment. Claimant had thrown a screw which hit a pipe and bounced back striking claimant in the eye. It was disputed whether claimant was engaging in horseplay when he threw the screw and whether claimant had violated a safety policy by his failure to have protective safety glasses on when the incident occurred. At the time of the accident the claimant was working at Nebraska Furniture Market for Simplex Grinnell, a subcontractor of Turner Construction.

After the preliminary hearing, the Administrative Law Judge (ALJ) entered an Order which authorized Dr. Gurinder Singh as claimant's treating physician and assessed the costs of the treatment against respondent Simplex Grinnell. Implicit in the Order is a finding that claimant suffered a compensable accidental injury arising out of his employment.

The respondent, Turner Construction, and its insurance carrier, Liberty Mutual Ins. Co., request review of the following: (1) whether the claimant's accidental injury arose out

of his employment; and, (2) whether the claimant failed to use a safety device provided by the employer. Respondent argues the claimant was involved in "horseplay" and failed to wear safety glasses which were a required safety device. Respondent requests the Board to reverse the ALJ's Order and deny claimant benefits.

The respondent, Simplex Grinnell, and its insurance carrier, Sedgwick CMS, raise the same issues as Turner Construction. Simplex Grinnell argues that the greater weight of the evidence establishes that the claimant failed to wear his safety glasses while engaged in horseplay.

Conversely, claimant argues that he was not engaged in horseplay when he threw the screw and instead had kneeled on the screw while crawling along the space where he was installing sprinkler system pipes. Claimant argues he picked the screw up and threw it in anger rather than at someone. In the alternative, claimant argues that the work atmosphere was relaxed and everyone engaged in horseplay from time to time. Lastly, claimant argues that he had removed his safety glasses to wipe the sweat from his eyes when he threw the screw in frustration. Consequently, claimant argues his action in removing the safety glasses was not done in a willful or wanton manner. Claimant requests the Board to affirm the ALJ's Order.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began his employment with Simplex Grinnell in June 2002, as a fire sprinkler installer in commercial buildings. He was working at the Nebraska Furniture Market. Claimant testified that on June 6, 2003, as he was crawling between carpet racks from one sprinkler head to another his left knee landed on a screw. Claimant then picked up the screw and tossed it. The screw ricocheted off a piece of sprinkler pipe and hit the claimant in his left eye.

Claimant's supervisor, Harold Scott Miller, heard claimant curse and then noticed claimant crawling toward him. Mr. Miller testified that claimant said he was horsing around, threw a screw and it came back and hit him in the eye.[1] Claimant's co-worker, Christopher A. Jones, also heard the exclamation and assisted claimant to the job trailer to get approval to go seek medical treatment. Mr. Jones then drove claimant to the hospital. During that trip Mr. Jones asked claimant what really happened and claimant stated that he was throwing screws across the room at another employee but that he had said it happened in frustration after kneeling on a screw so that he would not get into

[1] Miller Depo. at 10.

trouble. Claimant further told Mr. Jones that he was not wearing his hard hat or his safety glasses.

Mr. Miller further testified that there was a strict policy against horseplay and throwing screws would not have been tolerated if Mr. Miller had been aware that it was being done. Mr. Miller stated that horseplay was not tolerated and guidelines provide for a written warning after which an employee can be terminated for further instances of such activity. And Mr. Miller indicated that he had issued such written warnings. Mr. Jones agreed that horseplay was not acceptable behavior and even though he knew that claimant had engaged in such activity before the accident he did not know if Mr. Miller was aware that such activity was occurring.

Respondent contends that claimant's accident did not arise "out of" his employment, but instead occurred as a result of claimant's horseplay. The Board agrees. Claimant initially told his supervisor that he was horsing around when he threw the screw. Claimant later told a co-worker that he was throwing the screw at another employee when the accident occurred. And claimant admitted that he had previously engaged in throwing things at other employees.

K.S.A. 44-501(a) (Furse 2000) states, in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

Arising "out of" the employment is defined as follows:

> An injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.[2]

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the employment.[3]

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[2] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

[3] *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

Injury caused by horseplay does not normally arise out of employment and is not compensable. But if it is shown that the horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable.[4]

Throwing screws at other employees was, in no way, an integral part of claimant's employment with respondent. There was no indication in the record that any of claimant's supervisors were even aware of the activity until after the accident had occurred. Based upon the evidence in this record, the Board cannot find that respondent had actual knowledge of this horseplay. Therefore, the Board finds claimant has not proven accidental injury arising out of his employment with respondent on the date alleged.

The Board finds there was no causal connection between the accidental injury and claimant's employment with respondent. The injury occurred as a result of claimant's horseplay and is, therefore, not compensable. Consequently, the Board finds that the ALJ's Order granting claimant benefits should be, and is hereby, reversed.

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated March 10, 2004, should be, and is hereby, reversed, and claimant is denied benefits as his injury occurred as the result of horseplay and did not, therefore, arise out of his employment with respondent.

**IT IS SO ORDERED.**

Dated this _____ day of May 2004.

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BOARD MEMBER

c: Keith V. Yarwood, Attorney for Claimant
Kip A. Kubin, Attorney for Turner Construction/Liberty Mutual Ins. Co.
Steven C. Alberg, Attorney for Simplex Grinnell/Sedgwick CMS
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[4] See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919).